STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARY M. WATERSTONE,

Defendant-Appellee.

/

Michigan Supreme Court No. 140775

Court of Appeals No. 294667

Wayne County Circuit Court
No. 09-015867-01-AR

36th District Court No. 09-057635

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

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Dated: April 29, 2010

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QUESTION PRESENTED

In an order dated March 31, 2010, this Court invited the parties to file supplemental briefing by April 29, 2010, identifying the following as one of the questions to address:

> Whether the Court of Appeals erred in holding that the attorney general is disqualified from acting as special prosecutor in this criminal prosecution because of a conflict of interest under MRPC 1.10(a), arising from the attorney general's earlier representation of the defendant in a federal civil case involving the same facts.

INTRODUCTION

The Attorney General wishes to make four points in this brief, supplementing the arguments raised in his application and responding to April 28, 2010 defendant's supplemental brief.

First, the Attorney General has not violated Michigan Rules of Professional Conduct (MRPC) 1.9. Because the Michigan professional rules specifically contemplate the Attorney General serving as counsel for two State agencies taking adverse positions to one another, there is no violation where the Attorney General himself was not "involved" in the former client's representation, as described by the commentary to the rules. Defendant's argument is predicated on two errors: defendant claims that (1) the Attorney General may not assign an Assistant Attorney General to oversee a case without supervision (erecting a "conflict wall"), such as in the situation where there is a conflict between two State agencies or between the Attorney General and the Governor; and (2) the Attorney General is a party to the litigation merely because the matter is a criminal case. Defendant is mistaken on both points.

Second, the Attorney General has not violated MRPC 1.10. Defendant does not address the plain language of the professional rules, but merely asserts that the Department of Attorney General is the "equivalent" of a firm. This is wrong and does not comport with rule's text. As argued in the application, the Department of Attorney General is not a firm. Moreover, defendant's claim that the application of the rules advanced by the Attorney General is "unworkable" is belied by the fact that this demarcation between divisions as separate legal units is routinely used by the Department, as in litigation between the Public Service Commission, represented by the Public Service Division, and the Attorney General, as represented by the Special Litigation Division.

Third, defendant's contention that she was prejudiced by the fact that Special Agent Michael Ondejko and Assistant Attorney General John Dakmak did not inform defendant that she was the target of the investigation is ill-founded. As Special Agent Ondejko explained in his statement, defendant was not the target of the criminal investigation at the time that the investigative subpoena was served. More significantly, the admission by defendant in her supplemental brief that she "believed the Attorney General's office was investigating the conduct of the prosecutors and the police in the Aceval/Pena matter" is a fatal admission. See Defendant's Supplemental Brief, p 21. It demonstrates that defendant knew this was a state criminal matter and was not based on her prior representation in the federal civil case dismissed eight months earlier.

Fourth, the Attorney General's argument – that this rule announced by *Waterstone* requiring disqualification would have a chilling effect on the ability of the Attorney General to investigate public corruption – is not "overstated" as claimed by defendant. The Department of Attorney General represented more than 1,000 state employees last year alone – mostly corrections officials – and any claims of criminal misconduct related to these cases would not be able to be investigated by this office. The practical impediments created by the analysis of the *Waterstone* decision have already affected the operation of the Department of Attorney General – the Oakland County circuit court issued an order April 28, 2010 barring the Department of Attorney General from representing the Parole Board in a parole appeal because the Attorney General had prosecuted the defendant in the underlying criminal case. The *Waterstone* decision will have real and adverse effects on the specific statutory role that the Attorney General is designed to play as counsel for State agencies and as this State's Chief Law Enforcement Officer.

SUPPLEMENTAL ARGUMENT

1. There was no violation of MRPC 1.9.

Defendant's primary contention regarding MRPC 1.9 is that the Attorney General may not assign an Assistant Attorney General to serve as counsel for a client without supervising and directing that attorney under MCL 14.35. Defendant's Supplemental Brief, p 14. This argument misapprehends the nature of the professional rules and the special role that the Attorney General provides for the State in serving as counsel to all the State agencies and as serving as the Chief Law Enforcement Officer for the State.

As noted in the Attorney General's application, the preamble to the professional rules expressly contemplates that the Department of Attorney General may represent two State agencies, who are taking adverse positions to one another:

> [L]awyers under the supervision of these officers [Attorney General and prosecuting attorneys] *may be authorized to represent several governmental agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.* They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority. [Preamble to the professional rules, ¶ 17 (emphasis added).]

This same point, as acknowledged by defendant in her brief (Supplemental Brief, pp 18-19), was recognized by the Court of Appeals in *Attorney General v PSC.*[1]

But this role of providing dual representation contemplates two sets of attorneys within the Department of Attorney General serving as counsel under MCL 14.35. Such representation is consistent with MRPC 1.7 (concurrent representation) and MRPC 1.9 (former representation)

[1] *Attorney General v PSC,* 243 Mich App 487, 518-519; 625 NW2d 16 (2000).

where the Attorney General himself is not personally "involved" in the representation.[2] An attorney who was "involved" with the client's representation is forbidden from changing sides:

> The underlying question is whether the lawyer was so *involved* in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. [Comment to MRPC 1.9 (emphasis added).]

And here there is no dispute that the Attorney General was not personally involved in the representation of defendant in her federal civil case. Defendant was represented by Assistant Attorney General Steve Cabadas. Thus, there was no violation of MRPC 1.9 – the Attorney General did not serve as her counsel under the professional rules by the mere listing of his name. The Court of Appeals in *Waterstone* correctly ruled on this point. See *People v Waterstone,* slip op, p 6 ("the Attorney General himself does not have a direct conflict of interest, as his affidavit reflects that he was not privy to confidential information in the federal case").

Defendant's contention that the Attorney General may not "wall off" Assistant Attorneys General within the Department from his direct supervision under MCL 14.35 for conflict purposes is contradicted by the routine operation of the Department as contemplated by *Attorney General v PSC.* For example, the Attorney General has served as a party to litigation and as counsel to the other parties with adverse positions in *National Pride v Granholm* (same-sex benefits case),[3] *Coalition to Defend Affirmative Action v Granholm* (affirmative action case),[4] and most recently in *State of Florida et al v Department of Health and Human Services* (federal healthcare legislation litigation).[5] In fact, this Court requested the Department of Attorney General to serve as counsel on the question of the constitutionality of the law on voter

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[2] This analysis is consistent with the "accommodation" for the Attorney General based on his unique role that the Court of Appeals identified in examining the professional rules. *Attorney General v PSC,* 243 Mich App at 506.

[3] *National Pride v Granholm,* 481 Mich 56; 748 NW2d 524 (2008).

[4] *Coalition to Defend Affirmative Action v Granholm*, 501 F3d 775 (2007).

[5] *State of Florida et al v Department of Health and Human Services* (Case No. 3:10-cv-00091-RV-EMT)(ED Florida, 2010).

identification, MCL 168.523, in support of its constitutionality and in opposition to its constitutionality.[6] Even in the *Attorney General v PSC* case itself, the attorney who represented the Public Service Commission in that litigation did so as a Special Assistant Attorney General (SAAG) appointed under MCL 14.35.[7]

Defendant attempts to avoid the application of *Attorney General v PSC* by making an untenable argument. As noted, the Court of Appeals in *Attorney General v PSC* reasoned that the Attorney General may serve as counsel for two State agencies in an intergovernmental dispute as long as the Attorney General is not a party to the litigation.[8] If the Attorney General is a party, the Attorney General must either obtain a waiver or appoint a SAAG to represent the State agency.[9] Defendant contends that this waiver obligation is required here because the Attorney General is effectively the "party" in all criminal cases. Defendant's Supplemental Brief, pp 19-20. But this is wrong. There is a fundamental difference between the Attorney General as the party to the litigation, and the Attorney General as counsel for the People of the State of Michigan. As noted by this Court under MCL 14.28, the Attorney General is *the attorney* for the People of the State of Michigan in criminal cases.[10]

In brief, the Attorney General played no personal role whatsoever in defendant's representation in her federal civil case and, consistent with his authority to represent conflicting State agencies, the attorneys within a separate division within the Department of Attorney General – the Criminal Division – were not foreclosed from prosecuting defendant. There was no violation of MRPC 1.9.

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[6] *In re Request for Advisory Opinion regarding Constitutionality of 2005 PA 71*, 474 Mich 1230; 712 NW2d 450 (2006).
[7] See *Attorney General v PSC,* 243 Mich App at 489.
[8] See *Attorney General v PSC,* 243 Mich App at 518.
[9] *Attorney General v PSC,* 243 Mich App at 519 n 7.
[10] *People v Monaco,* 475 Mich 1222; 716 NW2d 587 (2006).

2. There was no violation of MRPC 1.10.

Defendant's supplemental brief does not specifically address the plain language of "firm" within the definition of MRPC 1.10. This is because the Department of Attorney General is not a "firm" using ordinary language. Rather, defendant is left to argue that the Department is the "*equivalent*"of a firm for the purposes of the rule. Defendant's Supplemental Brief, p 25. Such an analysis does not comport with the plain language of the rule.

More significantly, defendant does not address the importance of the comment to MRPC 1.10, which expressly addresses attorneys in a "legal service organization." These comments provide that the "firm" would encompass the attorneys within the same "unit" but not necessarily those in "separate" units:

> Lawyers employed in the same unit of a *legal service organization* constitute a firm, but not necessarily those *employed in separate units*. As in the case of independent practitioners, whether the lawyers should be treated as being associated with each other can depend on the particular rule that is involved and on the specific facts of the situation. [Comments to MRPC 1.10, ¶ 4 (emphasis added).]

These comments apply squarely to the Department of Attorney General, which fits within the definition of a legal service organization that is separated into different legal units.

The Department of Attorney General is comprised of separate units – separate divisions – that operate independently based on their different functions. The Public Employment, Elections & Tort (PEET) Division operates separately from the Criminal Division. Each has its own division head, is housed in separate bureaus, and operates independently from one another. In fact, the attorneys within the Criminal Division assigned to this case are housed in the City of Detroit, Cadillac Building, more than 90 miles from the Lansing office where the PEET Division is housed. This is one of the reasons that the former representation of defendant in the federal civil case was not identified by the attorneys within the Criminal Division until the complaint

and warrant were issued. The different divisions of the Department of Attorney General fit nicely within this framework of "employed in separate units."

Defendant's contention that this understanding of the rules is "unworkable" (Supplemental Brief, p 27) is contradicted by the actual practice of the Department. For example, the Public Service Division and the Special Litigation Division routinely take positions adverse to another in their representation of the Attorney General and the Public Service Commission. See for example *Attorney General v Michigan Public Service Commission* decided in 2009.[11] As a consequence, the information from within these divisions is screened from one another, and the appellate review process is separate. The briefs for the Special Litigation Division are reviewed within the Consumer & Environmental Protection Bureau, while the briefs of the Public Service Division are reviewed within the Solicitor General Bureau. This kind of arrangement is put into place wherever the State agency waives the conflict under *Attorney General v PSC* and the Department serves as counsel to the Attorney General and to the State Agency. Thus, as already noted earlier, where the Attorney General represents himself and serves as counsel for the Governor and these State officers take adverse positions to one another, the conflict procedure is implemented for the separate divisions serving as counsel. The representation that occurred in the *National Pride* case is an example of this.[12] Such a system is not unworkable. In fact, it does work and continues to do so.

In addressing the case law from outside of Michigan on this issue, defendant contends that the Minnesota Supreme Court's analysis in *Humphrey v McClaren* was mere obiter dictum. Defendant's Supplemental Brief, p 29.[13] Defendant is mistaken. Defendant quotes from page

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[11] *AG v PSC (In re Detroit Edison Co.)*, 483 Mich 993 (2009).
[12] *National Pride,* 481 Mich 56.
[13] *Humphrey v McClaren,* 402 NW2d 535, 538 (Minn 1987).

541 of the reported decision in which that court noted that it did not need to reach the issue of 1.10. The court did not need to reach the issue in that section of the analysis, section II, but the court then specifically reached the issue in section III – that is why the court stated "See, however, Part III(B), infra."[14] This is significant because this one of the few cases that squarely addresses this issue, and it supports the Attorney General's position.

3. Defendant was not prejudiced by the Department's prior representation of her in the federal civil case.

It is worth noting that defendant does not claim that there was some sharing of information between Assistant Attorney General Steve Cabadas and the attorneys from the Criminal Division, Assistant Attorneys General William Rollstin and John Dakmak, who handled the criminal investigation and prosecution.

Rather, defendant rests her claim of prejudice on her misunderstanding of the nature of the interchange between Special Agent Ondejko and defendant on November 25, 2008. But in addressing this issue, defendant makes a significant admission:

> Any fair reading of the transcripts from the interview and deposition of Judge Waterstone shows that she honestly, and reasonably, believed the Attorney General's office was investigating the conduct of the prosecutors and the police in the Aceval/Pena matter. [Defendant's Supplemental Brief, p 21.]

In other words, defendant knew that this matter related to the state criminal investigation of Karen Plants and the police officers who provided the perjurious testimony. There is an obvious difference between the federal civil case, which was dismissed eight months earlier, and a state criminal investigation. Defendant here concedes that she knew that this was a state criminal matter. As a consequence, she complains that she had not been informed that *she was the target of the state criminal investigation.* Defendant's Supplemental Brief, p 20. But this is an entirely

[14] *Humphrey,* 402 NW2d at 541, and 543 ("it is our view that a governmental legal department is not a 'firm' under Rule 1.10 (conflict of interest)"). See also *Bullock v Carver,* 910 F Supp 551 (DC Utah, 1995).

separate point. There is no credible basis on which defendant may contend that she believed this meeting was a continuation of her prior federal civil representation.

And on the point that the police and the prosecution did not inform defendantthat she was the target of the investigation, there is a simple response. She was not. Special Agent Ondejko repeatedly stated this point – she was not a target at the time he delivered her investigative subpoena. Appendix F, 19-20, 22. This point is consistent with the fact that the Wayne County referral for this investigation was for Karen Plants. Appendix C, p 1. And there is no legal obligation in any event for the police to inform a suspect that he is a target of an investigation or inform the suspect of his rights before the police interview that person when that person is not in custody.[15] There was nothing improper about the conduct of Special Agent Ondejko even if defendant had initially been the target of the investigation.

As noted in the Attorney General's application, if somehow this Court determined that the interview with defendant was improper under the professional rules, the right remedy would be to suppress the information obtained from defendant, not to "deem" the Attorney General's office a firm for purposes of MRPC 1.10(a). See *Waterstone,* slip op, p 11.

4. The Attorney General's contention that disqualification of the Attorney General's office here may have a chilling effect on the investigation of public corruption is not "overstated" as defendant suggests.

Defendant argues that the Attorney General's point that the *Waterstone* decision may have an adverse effect on the ability of the Department of Attorney General to investigate public corruption is "overstated." Defendant's Supplemental Brief, p 17. This is untrue.

The Department of Attorney General generally serves as counsel for State employees when sued based on their conduct during the course of their employment. In 2009 alone, the

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[15] *Oregon v Mathiason,* 429 US 492, 494-496; 97 S Ct 711; 50 LEd2d 714 (1977); *People v Hill,* 429 Mich 382, 384; 415 NW2d 193 (1987).

Department represented more than 1,000 employees in civil suits based on allegations of some form of wrongdoing or legal error. In 2009, the Corrections Divisions by itself represented more than 1,000 individuals, and the Public Employment, Elections & Tort Division represented more than 30 State troopers, 20 corrections officers, and represented judges in 33 cases. At the same time, in the last five years, the Criminal Division has investigated eight cases of criminal misconduct by the Michigan State Police, and seventeen cases of criminal misconduct by corrections officials. These investigations resulted in the prosecution of seven different cases in which State troopers were charged with crimes and two in which correction officers were charged with crimes. The ability of the Department of Attorney General to investigate public corruption is a significant consideration. This is one of the roles contemplated by the Legislature under MCL 14.30.

Moreover, the rule identified from the *Waterstone* decision is also unworkable. The Court of Appeals suggests that a simple "conflict check" would have yielded the former representation of defendant. *Waterstone*, slip op, p 11. But this conclusion is predicated on a misunderstanding of the nature of the investigation here and investigations more generally. Defendant was not one of the targets of the initial investigation. There were numerous witnesses associated with the investigation, and only three initial targets: Karen Plants, Robert McArthur (Inkster police officer), and Scott Rechtzigel (Inkster police officer). Any initial conflict check would not have identified the former representation of defendant by the Department because there would have been no reason to run the name of defendant at that time – unless the Court of Appeals anticipates that the conflict check would be run for all persons associated with the case in the event that the person might develop into a target. But this would increase dramatically the

number of names to run and would make it very difficult for the Department to prosecute State troopers, correction officials, or even judges.

The Department of Attorney General has already begun to encounter claims of conflict that compromise the ability of the Department to meet its constitutional and numerous statutory obligations. This Court may take judicial notice of the fact under MRE 201 that on April 28, 2010, Oakland County circuit court rejected the motion of an Assistant Attorney General to intervene on behalf of the Parole Board on a parole board appeal in *Oakland County Prosecutor's Office v James Morris* (No. 2010 – 108971-AP). See Attachment A. The court determined that the Department of Attorney General was foreclosed from intervening based on a conflict under *Waterstone* because the Attorney General had been the prosecution agency against Morris in the first instance.

The decision in *Waterstone* has implications well beyond the confines of this particular case. These ramifications will hinder the ability of the Department of Attorney General as an institution to meets its obligations to serve in its dual role as both counsel to State agencies and to serve as the Chief Law Enforcement Officer for the State now and in the future. This Court should grant leave and reverse.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, the People of the State of Michigan, Appellant, respectfully request that this Court grant the Attorney General's application for leave or otherwise issue an opinion reversing the decision of the Court of Appeals.

Respectfully submitted,

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Dated: April 29, 2010

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Oakland County Prosecutors Office
Plaintiff,

-v- James Robert Morris
Defendant.

Case No. 2010-108971-AP
HONORABLE MARTHA ANDERSON

ORDER / RE: MOTION

At a session of said Court, held in the City of Pontiac, Oakland County, Michigan, this 28th day of April, 2010.

Present: HONORABLE MARTHA ANDERSON
Circuit Court Judge

This matter having come before the Court on (Plaintiff / Defendant):

Parole Board of MDOC's, Motion for to Intervene
Name State nature of motion

and the Court being advised in the premises;

IT IS HEREBY ORDERED that the motion is:

☐ Granted

☐ Denied

☑ Granted in part, as explained in the comment below.

Comment: The Michigan Parole Board's motion to Intervene is granted, but the Michigan Attorney General is prohibited from representing the Parole Board due to a conflict of interest pursuant to the People v Waterstone decision of the Michigan Court of Appeals.

DATE: 4-28-10

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk – Register of Deeds

By [signature]
Deputy

DO NOT WRITE IN THIS SPACE

[signature]
HON. MARTHA ANDERSON, Circuit Court Judge

APPROVED AS TO ~~SUBSTANCE~~ AND FORM

APA [signature]

[signature] P59189

[signature] 52380

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Attachment A